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NO. 71-1466

IN THE

Supreme Court of the United States

October Term, 1971

RICHARD WILLIAM GORSALITZ, *Petitioner*

v.

OLIN MATHIESON CHEMICAL CORPORATION,
Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR REHEARING

JOHN H. HOLLOWAY
Attorney for Petitioner

12600 Memorial Drive, Suite 208
Houston, Texas 77024

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

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PETITION FOR REHEARING

Petitioner, Richard William Gorsalitz, presents his petition for a rehearing of this Court's order dated June 19, 1972, denying his petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit, and, in support thereof, respectfully shows:

GROUNDS FOR REHEARING

Argument on rehearing is confined solely to denial of $206,004 in damages by affirmance of the remittitur required by the trial court, petitioner hoping to more

clearly "pinpoint" the need for this Court's review of the case under established legal principles.

In taking away $206,004 in damages assessed by the jury, the trial court states:

> "As to future loss of earnings, the evidence upon trial would not support a jury finding in excess of $13,000 per annum for the remainder of plaintiff's life. Plaintiff's life expectancy was shown to be 34.8 years. Considering the plaintiff's injuries and medical prognosis, the jury could not reasonably find a life expectancy in excess of this figure. Thus, the total amount for loss of future earnings would be $452,400. However, the jury was instructed to award only such sum of money if now paid in cash as would reasonably compensate the plaintiff for his loss. Taking into consideration the decreased buying power of the dollar at present day and other intangibles that a properly functioning jury may consider in assessing an award for loss of future earnings, I find that the maximum amount the jury could reasonably determine to be compensatory of plaintiff's loss of future earnings, if now paid in cash, is $246,396."

In affirming this remittur, the Fifth Circuit clearly ignores its own settled rule of law as to future wage losses, as announced in *St. Louis Southwestern Railway Co. v. Williams,* 397 F.2d 147 (5th Cir. 1968), wherein the Court states:

> "It was open to the jury to reason that his wage rate would probably have increased and that his expectancy of earnings would have been larger."

The holding likewise conflicts with *Rosiello v. Sellman,* 354 F.2d 219 (5th Cir. 1965), and *Brinegar v. San Ore Construction Co.,* 302 F.Supp. 630, stating:

> "The jury could have found, however, that the normal increase in earning capacity . . . along with inflation, could have offset any reduction to present value."

A "classic conflict of decisions" exists because the Court has reduced a jury award of $452,400 in future wage loss to $246,396 by use of the "annuity formula", which formula the Fifth Circuit has previously and consistently held cannot be applied as to such measure of damage. Surely the Supreme Court's discretionary powers to preserve jury verdicts under the Seventh Amendment, and to maintain legal precedent and unanimity of case law, compels the Court to grant this petition.

Further, the present opinion conflicts with *United States v. 1160.96 Acres of Land,* 432 F.2d 910 (5th Cir. 1970), wherein the Fifth Circuit actually cites *Gorsalitz* for the premise that "an incorrect legal standard" cannot be the basis for a remittitur, stating:

> *"The remittitur was erroneous because it is based on an incorrect legal standard.* Whatever doubt there might have been before, this Court has now adopted the rule which limits reductions to the highest amount which the jury could have found."

In finding that the jury's award for future wage loss could have been reasonably construed to be $452,400 based on wages at time of trial, the Court was applying an "incorrect legal standard" in reducing such maximum recovery by an annuity formula.

Insistence on mathematical precision would be illusory and the jury must be allowed a fair latitude to make reasonable approximations as to future losses guided by judgment and practical experience.

In the landmark case of *Barry v. Edmunds*, 116 U.S. 550, 6 S.Ct. 501, 29 L.Ed. 729 (1886), this Court recognized this premise, stating:

> " . . . in actions for torts where no precise rule of law fixes the recoverable damages, it is a peculiar function of the jury to determine the amount of their verdict."

The present decision "usurps" this jury function and substitutes the trial court's determination of damages for future lost wages at "the minimum recovery", rather than maximum recovery, by denying over $200,000 in damages assessed by the jury.

The orderly administration of justice, and the "due process of law" provision of the Constitution of the United States, dictates this Court grant this petition because of application of the "incorrect legal standard" under the remittitur practice.

If in fact the jury's evaluation of future wage loss was $452,400, as determined by the Court, then under both the *Grunenthal* and *St. Louis S. W. Railway Co.* decisions the jury could refuse to discount this amount, based upon "current wages of $13,000 as of time of trial", because the jury could have legally and factually reasoned that the future annual wage would have been greater than $13,000 due to either normal wage increases or future inflations in salary.

Since the "maximum recovery" rule is to be applied, its application necessarily required the Court to allow the full $452,400 allegedly assessed by the jury for loss of future wages. Otherwise, the risk of obtaining "fair compensation" is cast upon the injured, rather than the

wrongdoer; and, the benefits of a jury verdict as guaranteed by the Seventh Amendment are destroyed by judicial review of "second guessing".

In refusing certiorari in this case, the Supreme Court ignores the very basis for its review of a remittitur as expressed in *Grunenthal v. Long Island R. Co.*, 89 S.Ct. 331, 393 U.S. 156, 21 L.Ed.2d 309 (1968), and the very type of "judicial interference" with damage findings condemned by this Court in that opinion, which interference is said to require the Court of Appeals to make a "detailed appraisal of the evidence bearing on damages":

> *"We read Dagnello, however, as requiring the Court of Appeals in applying this standard (abuse of discretion) to make a detailed appraisal of the evidence bearing on damages.* Indeed this re-examination led to the conclusion in Dagnello that it was not a denial of justice to permit the jury's award to stand. *If the Court of Appeals made a similar appraisal of the evidence in this case, the details are not disclosed in the majority opinion.* Beyond attaching unexplained significance to petitioner's failure in his complaint 'to ask for damages in such a large sum as $305,000,' the relevant discussion is limited to the bald statement that "giving Grunenthal the benefit of every doubt, and weighing the evidence precisely in the same manner as we did in Dagnello . . . we cannot in any rational manner consistent with the evidence arrive at a sum in excess of $200,000.' 388 F.2d, at 484. *We have therefore made our own independent appraisal of the evidence.*". (italics added)

The Supreme Court has not made an "independent appraisal of the evidence" in this case because current practices of the Court do not permit filing of the record *unless*

certiorari is granted. However, the same argument made in *Grunenthal* is applicable to the opinion of the Fifth Circuit in the present case. . . If the appellate court appraised the evidence, the details are not disclosed in its opinion.

CONCLUSION AND CERTIFICATE

Petitioner respectfully urges this petition for rehearing be granted, and that a writ of certiorari issue to the United States Court of Appeals for the Fifth Circuit.

Counsel for petitioner further certifies that this petition for rehearing is presented in good faith and not for delay, and in accordance with Rule 58, subdivision 2, of the Rules of this Court, by his signature below.

Respectfully submitted,

JOHN H. HOLLOWAY
Attorney for Petitioner
12600 Memorial Drive, Suite 208
Houston, Texas 77024

CERTIFICATE OF SERVICE

By my signature above, I hereby certify that a true copy of this petition for rehearing was served by United States Mail, postage prepaid, on counsel for respondent, Vinson, Elkins, Searls & Smith, First City National Bank Building, Houston, Texas, 77002, on this the 11th day of July, 1972.